Supreme Court, U.S.
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No. _____

In the

# Supreme Court of the United States

**OCTOBER TERM, 1994**

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Jennings and Mitzi Osborne, *Petitioners*

*v.*

Arleta Power, *et al.*, *Respondents*

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On Petition for a Writ of Certiorari to the
Supreme Court of Arkansas

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb, contains a "nuisance exception" which allows courts to bypass strict scrutiny and enjoin nuisance-causing religious exercises based on a common-law reasonableness standard.

2. Whether RFRA protects only religious exercises which are mandatory under the tenets of a person's faith.

3. Whether the state's interest in preventing traffic congestion and minor trespassing is sufficiently compelling, under RFRA, to justify an injunction substantially burdening the religious exercise of displaying Christmas lights.

4. Whether a state-court injunction "to reduce substantially the size and extravagance" of Christmas light displays so they are no longer "massive" and "calculated to and do attract an unusually large number of visitors to the neighborhood" is too broad and vague to satisfy RFRA's requirement that any government action which substantially burdens a person's exercise of religion be the least restrictive means of furthering a compelling governmental interest.

## LIST OF PARTIES

The parties are as follows:

Petitioners: Jennings and Mitzi Osborne

Respondents: Arleta Power, Dennis Lucy, Tom Fiser, and Catherine Cockrill

The same people were parties in the proceedings below. Two additional parties--Dick Wallace and Joe H. Smith--were aligned with the Respondents at trial, but they were dismissed and did not challenge the dismissal on appeal.

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In the

# Supreme Court of the United States

October Term, 1994

No.

JENNINGS and MITZI OSBORNE, *Petitioners,*

v.

ARLETA POWER, *et al., Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

The Petitioners, Jennings and Mitzi Osborne, respectfully pray that a writ of certiorari issue to review the final injunctive decree entered in this case by the Supreme Court of Arkansas on December 5, 1994.

## OPINIONS BELOW

The opinion of the Arkansas Supreme Court dated December 5, 1994, explaining the rationale for the injunction entered against the Osbornes, is reported at 318 Ark. 858, 890 S.W.2d 570 (1994) *(Osborne I)* and is reprinted as Appendix A to this Petition. The opinion of the Arkansas Supreme Court dated December 16, 1994, denying the Osbornes' motion for a stay of mandate, is reported at 319 Ark. 52, 890 S.W.2d 574 (1994) (per curiam) *(Osborne II)* and is reprinted as Appendix B. The opinion of the Arkansas Supreme Court dated December 20, 1994, ordering Jennings Osborne to show cause why he should not be held in contempt of court, is reported at 319 Ark. 177, 890 S.W.2d 575 (1994) (per curiam) *(Osborne III)* and is reprinted as Appendix C. The opinion of the Arkansas Supreme

Court dated January 9, 1995, appointing a special master to conduct an evidentiary hearing in the contempt proceeding, is reported at 319 Ark. 239, 890 S.W.2d 577 (1995) (per curiam) *(Osborne IV)* and is reprinted as Appendix D. The unreported December 9, 1993, order by Chancellor Ellen B. Brantley, enjoining the Osbornes' Christmas lights display, is printed as Appendix E. Judge Brantley's unreported supplemental order of January 10, 1994, is printed as Appendix F.

## JURISDICTION

The Supreme Court of Arkansas filed its opinion and entered its final injunctive decree on December 5, 1994. A timely Petition for Rehearing was denied, without opinion, on January 23, 1995, and this Petition for a Writ of Certiorari is being filed within 90 days of that date. A copy of the order denying the Petition for Rehearing is printed as Appendix G to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## STATUTORY PROVISION INVOLVED

The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (Supp. V 1994)), is reproduced as Appendix H.

## STATEMENT OF THE CASE

### a. The Osbornes' Exercise of Religion

Since 1986, Mitzi Osborne, a Roman Catholic, and Jennings Osborne, a Baptist, have displayed Christmas lights at their residence in Little Rock, Arkansas, as expressions of their religious faith. The lights illuminate a number of important religious symbols: a nativity scene, angels, crosses, a church, a minister and worshipers, and Bible verses. These symbols are manifestations of the Osbornes' sincere religious beliefs. The following is an abstract of Mitzi Osborne's testimony at trial concerning the religious content of Petitioners' Christmas display:

> I am Roman Catholic and the Advent signs the coming of the birth of our Lord. We express ourselves every Advent season at church and at our house. At church, we have an Advent wreath and candles. My daughter is Roman Catholic also. The purpose of the Christmas lights is to announce the birth of our Lord and to spread far and wide the news of the birth of our Lord. (R. 1004-05.)
>
> * * *
>
> A viewer of our display would undoubtedly understand our message. (R. 1006.)
>
> * * *
>
> In 1993 the carrousels have twelve angels on each one. The train with St. Nick driving has a reference to John 8:12. There is also a light of the world. Inside the gate, we have religious and secular Christmas music, but it is not played loud enough to bother anyone outside. We intend to have the calliope again this year and it

> plays tunes. There will be a nativity scene. (R. 1007-09.) The nativity scene is like the one in the Vatican. There will also be a church with carolers and a minister. There is a boy with a sled and a lot of angels. There will be bells that appear to toll. There will be candles. (R. 1010-12.)

Abstract and Brief of Appellants, Vol. I, at 148-49.[1]

Some of the Osbornes' neighbors objected to the Christmas display and sued to enjoin it, alleging that onlookers caused traffic congestion and otherwise interfered with the use and enjoyment of their property.

b. **Proceedings Below**

1. May 24, 1993. Arleta Power and the other Respondents filed suit in the Chancery Court of Pulaski County, Arkansas. Count I of their Complaint alleged that the Osbornes' Christmas display constituted a public and private nuisance. Count II sought enforcement of a clause in a 1949 bill of assurance which prohibited property owners from maintaining any activities that are "offensive," an annoyance, or a nuisance. The Complaint requested an injunction abating the Christmas lights display.

2. November 16, 1993. The President signed into law the Religious Freedom Restoration Act of 1993, Pub. L. No.

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[1] In Arkansas appellate practice, the abstract is the appellant's abridgment of the record. An abstract consists "of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the Court for decision." Ark. Sup. Ct. Rule 4-2(a)(6).

103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (Supp. V 1994)).

3. November 29, 1993. The case came to trial before Chancellor Ellen Brantley. The Osbornes defended on three grounds: (a) their Christmas lights display did not constitute a public or private nuisance under Arkansas law; (b) the display was protected under the Freedom of Speech and Free Exercise of Religion Clauses of the First Amendment (made applicable to the states by the Fourteenth Amendment); and (c) the display was protected by RFRA. Judge Brantley rejected all three defenses and held that the Christmas lights display constituted a public and private nuisance primarily because it caused traffic congestion. With respect to the Osbornes' RFRA defense, Judge Brantley stated:

> I hold that the decision that I'm going to render will not be a substantial burden on the free exercise of Mr. Osborne's religion. Now, I might be wrong and, if so, that will have certain consequences. But that's the only way I'm going to deal with the act. I'm saying I do not think that the order entered in this case will substantially burden his exercise of religion.[2]

Abstract and Brief of Appellants, Vol. II, at 213.

4. December 9, 1993. Judge Brantley entered an order limiting the Osbornes' Christmas lights display to a fifteen-day period between December 14, 1993, and January 6, 1994. The lights were to be illuminated no earlier than 7:30 p.m. each night except for Christmas Eve, when the hours of the display were limited to 5:00 p.m. to 8:00 p.m. Judge Brantley also ordered the Osbornes to implement an operating plan they had

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[2] The Chancellor did not mention Mitzi Osborne's RFRA defense.

introduced at trial. (App. E.)

5. January 10, 1994. Judge Brantley entered an order denying the Osbornes' motion for reconsideration and making supplemental findings. The Chancellor found that the Osbornes' Christmas lights constituted both a public and a private nuisance. Judge Brantley also found that the Christmas display violated certain restrictions in the neighborhood bill of assurance, which restrictions "are essentially identical to the restrictions imposed by the common law of nuisance." (App. F at 25as.) The Chancellor rejected the Osbornes' RFRA defenses on the ground that RFRA protects only mandatory religious exercises, and the Osbornes' faiths do not require them to display Christmas lights:

> With respect to the free exercise of religion claim raised by Defendants [the Osbornes], the Court finds that the evidence established that the construction and maintenance of a Christmas light display was not required by the religious beliefs held by the Defendants. The remedy provided in the Court's Order of December 9 does not offend the Free Exercise clause of the First Amendment, because it does not substantially burden the free exercise of religion under the evidence presented at the trial. The Religious Freedom Restoration Act does not change this result, because the Order of December 9 does not substantially burden the free exercise of religion, since the construction and maintenance of a Christmas light display is not a required tenet of the Defendants' religious beliefs or practice.

(App. F at 25a-26a.)

6. January 13, 1994. The Osbornes filed a timely Notice of Appeal in the Arkansas Supreme Court. Power and the other Respondents cross-appealed. The Osbornes argued on appeal,

inter alia, that the trial court's ruling violated their rights under RFRA. (*See* Abstract and Brief of Appellants, Vol. II, at 245-50; Reply Brief of Appellants and Response Brief on Cross Appeal, at 12-13.)

7. December 5, 1994. The Arkansas Supreme Court, on *de novo* review, modified the injunction issued by Judge Brantley. Following a pre-RFRA Louisiana decision enjoining a Christmas display, *Rodrigue v. Copeland*, 475 So. 2d 1071 (La. 1985), *cert. denied*, 475 U.S. 1046 (1986), the Arkansas Supreme Court held that the restrictions imposed by Judge Brantley

> are insufficient to abate the nuisance and, much as was done by the Louisiana court in Rodrigue, we enjoin cross-appellees, the Osbornes, from placing massive Christmas light displays on and about their home that are calculated to and do attract an unusually large number of visitors to the neighborhood. Further, cross-appellees are ordered to reduce the volume of any sound accompanying the display so that it is not audible from within the closest homes of neighbors.
>
> In ordering the nuisance abated, we place the burden on the cross-appellees, the Osbornes, to reduce substantially the size and extravagance of the display at and about their home to a level which will not attract the large crowds that have been drawn to the neighborhood in the past. Of course, this injunction only applies to the cross-appellees' residence, and they are free to maintain a massive display in an unrestricted manner at a location where it is appropriate.

*Osborne I*, 318 Ark. at 866, 890 S.W.2d at 574 (citation omitted). The Court based its injunction abating the Osbornes' Christmas display on two related findings: (a) the display constituted a public and private nuisance at common law; and (b)

as a nuisance, the display violated the neighborhood bill of assurance. The Court held that RFRA does not protect a religious exercise unless it is mandatory, and further held that nuisances are excluded from RFRA's coverage. The Court rejected the Osbornes' RFRA argument in two brief paragraphs:

> As appellants [the Osbornes] admitted in their testimony, there is nothing about their religious beliefs which dictates that they must celebrate the Christmas season by a massive display of electric lights. Consequently, to place limitations upon such activity does not constitute an impermissible burden upon the practice of religion. Clearly, any injunctive relief by way of restricting the scope or magnitude of the display is "content-neutral" and, accordingly, is subject to reasonable restraint that burdens no more speech than necessary to protect the rights enumerated above.
>
> In *Western Presbyterian Church v. Board of Zoning Adjustment*, 63 U.S.L.W. 2169 (1994) [849 F. Supp. 77, 862 F. Supp. 538 (D.D.C. 1994)], a recent case involving feeding the homeless pursuant to a church program, the Court held that the zoning ordinance was unconstitutional in its total prohibition and allowed the feeding to be conducted. However, the Court noted that this license was limited to circumstances that did not otherwise become a nuisance, thus recognizing that the Religious Freedom Restoration Act, of itself, would not bar restrictions on activities that are nuisances.

*Osborne I*, 318 Ark. at 863-64, 890 S.W.2d at 572-73.

8. December 13, 1994. The Osbornes asked the Arkansas Supreme Court to stay its mandate pending review on certio-

rari by the Supreme Court of the United States. As their basis for seeking United States Supreme Court review, the Osbornes asserted that the December 5 injunctive decree rested upon a misinterpretation of RFRA.

9. December 16, 1994. The Arkansas Supreme Court denied the Osbornes' Motion for a Stay of Mandate. The Court reiterated its rejection of the Osbornes' RFRA defense, stating: "As discussed in our December 5 opinion, we view this case as one involving a public and private nuisance, not religious beliefs, and the RFRA is simply not controlling." *Osborne II*, 319 Ark. at 53, 890 S.W.2d at 575. Again the Court relied on *Rodrigue v. Copeland, supra*, the Louisiana case in which the court applied a reasonableness test to the abatement of a Christmas display containing some religious symbols. Patterning its order on the Louisiana injunction, the Arkansas Supreme Court declared that it had

> specifically directed the Osbornes to *reduce substantially* (1) the size and extravagance of the display at and about their home so the display will not attract large crowds to the residential neighborhood and (2) the volume of any sound accompanying the display so it is not audible from within the closest homes of neighbors.

*Osborne II*, 319 Ark. at 52, 890 S.W.2d at 575. Moreover, the Court rejected the Osbornes' argument that the December 5 injunction was too broad and vague to satisfy the least-restrictive-means test of RFRA.

10. December 17-19, 1994. The Osbornes illuminated a Christmas display containing approximately 175,000 lights, five percent (5%) of the number lit in 1993.

11. December 19, 1994. Power and the other Respondents asked the Arkansas Supreme Court to hold Jennings Osborne in contempt for allegedly violating the December 5 injunction

and December 16 order.

12. December 19, 1994. The Osbornes applied to the Supreme Court of the United States for an order staying the enforcement of the Arkansas Supreme Court's injunction pending review on certiorari.

13. December 20, 1994. Justice Clarence Thomas, Circuit Justice for the Eighth Circuit, denied the Osbornes' application for a stay.

14. December 20, 1994. The Arkansas Supreme Court ordered Jennings Osborne to appear before the Court to show cause why he should not be held in contempt of court for willfully disobeying the Court's orders. *Osborne III*, 319 Ark. at 180, 890 S.W.2d at 577.

15. December 21, 1994. The Osbornes filed a timely Petition for Rehearing. The petition asserted that the December 5 injunction conflicted with RFRA.

16. December 27, 1994. Jennings Osborne appeared before the Arkansas Supreme Court and entered a plea of not guilty to the charge of contempt.

17. January 9, 1995. The Arkansas Supreme Court appointed the Honorable George Cracraft, retired chief judge of the Arkansas Court of Appeals, as a master "to conduct an evidentiary hearing necessary for [the Supreme Court] to decide whether Mr. Osborne, by the lighting of his Christmas display on December 17, 18, and 19 of 1994, willfully disobeyed this Court's prior December 5 and 12, 1994, orders. " *Osborne IV*, 319 Ark. at 240, 890 S.W.2d at 577.

18. January 23, 1995. The Arkansas Supreme Court denied the Osbornes' Petition for Rehearing, issued its mandate, and remanded the case to the Chancery Court.

19. January 30, 1995. In the contempt proceeding against

Jennings Osborne, the Arkansas Supreme Court denied Osborne's request for trial by jury and denied his motion to disqualify Respondents' counsel from serving as the prosecutor. (A copy of the order is printed as Appendix I.)

20. February 20, 1995. The Arkansas Supreme Court denied Jennings Osborne's motion for discovery and entered the following order: "Contempt proceedings [against Osborne] are to be considered criminal in nature with a possible range of punishment as set forth in Ark. Code Ann. § 16-10-108. *See Carle v. Burnett,* 311 Ark. 477, 845 S.W.2d 7 (1993)." (A copy of the order is printed as Appendix J.)[3]

21. March 13-14, 1995. Judge Cracraft, the master appointed by the Supreme Court, conducted an evidentiary hearing on the charge of criminal contempt against Jennings Osborne.

22. April 4, 1995. Judge Cracraft submitted his evidentiary findings in the contempt case to the Arkansas Supreme Court. (The Report of the Master is printed as Appendix K.) Judge Cracraft made three findings: (a) Jennings Osborne had substantially reduced the size and extravagance of his Christmas display, as required by the December 5 and 16, 1994, rulings; (b) the 1994 display was neither calculated to attract nor did attract unusual numbers of visitors to the Osbornes' neighborhood; (c) the 1994 display did not generate any sound that was audible from within the closest homes of neighbors. Judge Cracraft also concluded that Osborne had acted on the advice of counsel.

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[3]The Arkansas statute cited by the Court authorizes a fine of up to fifty dollars ($50.00) and imprisonment for up to ten days. In *Carle,* however, the Court held that the contempt statute does not restrict the judiciary's inherent power to punish for contempt. The Court sentenced the contemner in that case to five days in jail and a fine of $500.00. 311 Ark. at 484, 845 S.W.2d at 11.

## REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the case presents important questions concerning the scope and meaning of RFRA, a recently enacted statute that already has generated considerable confusion in the lower courts. The decision below conflicts with several United States district court decisions construing RFRA, providing a clear illustration of the need for definitive guidance from this Court.

### I. The Arkansas Supreme Court's Conclusion that RFRA Contains a "Nuisance Exception" Conflicts with United States District Court Decisions Holding that RFRA Requires Strict Scrutiny in All Cases Involving a Substantial Governmental Burden on the Exercise of Religion.

Under RFRA, a state court may not enjoin or otherwise "substantially burden a person's exercise of religion" unless the party invoking the court's aid "demonstrates that application of the burden to the person -- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-l(b). The Arkansas Supreme Court concluded, however, that RFRA does not apply to religious exercises which cause a public or private nuisance. *Osborne I*, 318 Ark. at 864, 890 S.W.2d at 573; *Osborne II*, 319 Ark. at 53, 890 S.W.2d at 575. In effect, the Court's recognition of a "nuisance exception" to RFRA created a two-tiered standard of review: injunctions abating religious "nuisances" merely have to pass muster under a weak common-law reasonableness standard,[4]

[4] By explicitly adopting the Louisiana Supreme Court's reasoning in *Rodrigue v. Copeland*, 475 So. 2d 1071 (La. 1985), the Arkansas Supreme Court signified its understanding that under nuisance law, court-ordered restrictions on landowners' conduct need only be reasonable. The Louisiana Supreme Court concluded its opinion in *Rodrigue* by stating: "The restrictions imposed on defendant's [Christmas] display do not contravene

whereas all other injunctions that substantially burden religious exercises must satisfy RFRA's strict compelling-interest/least-restrictive-means test.

The Arkansas Supreme Court's creation of a RFRA double standard places *Osborne* squarely in conflict with six United States district court decisions: *Best v. Kelly*, No. 87-CV-1065C, 1995 WL 126351, at *3 (W.D.N.Y. Mar. 16, 1995); *Levinson-Roth v. Parries*, 872 F. Supp. 1439, 1451 (D. Md. 1995); *Diaz v. Collins*, 872 F. Supp. 353, 358 (E.D. Tex. 1994); *Campos v. Coughlin*, 854 F. Supp. 194, 204-06 (S.D.N.Y. 1994); *Lawson v. Dugger*, 844 F. Supp. 1538, 1541-42 (S.D. Fla. 1994); *Allah v. Menei*, 844 F. Supp. 1056, 1061-63 (E.D. Pa. 1994). In those federal cases, the courts held that Congress intended to adopt a single standard of review--strict scrutiny--for all instances of substantial governmental interference with religious exercises. Moreover, Congress meant to preempt the various reasonableness tests that courts sometimes applied in Free Exercise cases before RFRA was enacted.

The analysis in *Allah* is helpful in explaining how *Osborne* conflicts with other interpretations of RFRA. Like the other federal cases cited above, *Allah* involved regulations which purportedly burdened inmates' religious conduct. The court noted that, prior to RFRA, prison or jail regulations merely had to satisfy a reasonableness test. *See Turner v. Safley*, 482 U.S. 78, 89 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). But RFRA changed that rule:

> The Senate Report makes clear Congress' intent that there be one standard for examining claims of substantial government infringement on religious practice. 42 U.S.C. §§ 2000bb(a)(5),

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his constitutional right to express his beliefs. Our decree merely places *reasonable limitations* on the size of the display in order to prevent defendant's expression from infringing on the rights of the plaintiffs." 475 So. 2d at 1080 (emphasis added).

> 2000bb(b)(1); S. Rep. No. 103-111. The compelling interest test set forth in *Sherbert [v. Verner,* 374 U.S. 398 (1963)] now controls all controversies involving substantial state burdens on religious practice. 42 U.S.C. § 2000bb-1(b); S. Rep. No. 103-111. . . . The Act rejects the *O'Lone* reasonableness standard and embraces the compelling interest test as articulated in *Weaver v. Jago,* 675 F.2d 116 (6th Cir. 1982).

*Allah,* 844 F. Supp. at 1062-63.

As authority for its contrary interpretation of RFRA, the Arkansas Supreme Court relied on a decision of the United States District Court for the District of Columbia, but that reliance was misplaced. In *Western Presbyterian Church v. Board of Zoning,* 849 F. Supp. 77 (granting permanent injunction), 862 F. Supp. 538 (D.D.C. 1994) (granting permanent injunction), the court held that a church's program for feeding the homeless qualified as a religious activity covered by RFRA. The District of Columbia government tried to prohibit the program through its zoning laws but failed to demonstrate that those laws satisfied RFRA's compelling-interest/least-restrictive-means test. Accordingly, the court enjoined enforcement of the laws, adding, "If circumstances change and the feeding program becomes a nuisance, upon a proper showing this Court will appropriately modify its final order." 862 F. Supp. at 546.

The Arkansas Supreme Court took this statement to mean that RFRA does not apply to nuisances. *Osborne I,* 318 Ark. at 864, 890 S.W.2d at 573. Read in context, however, the district court's dictum does not suggest that RFRA wholly excludes conduct which causes a nuisance. Rather, the district court was simply saying that if the church's RFRA-protected activity caused a nuisance, the court would revise its remedy by scaling down the injunction from a total prohibition against gov-

ernmental regulation to a more limited restriction. That is far different from the Arkansas Supreme Court's conclusion that nuisance-creating activity lies completely outside the purview of RFRA.

A clear conflict exists between *Osborne* and federal cases construing RFRA. Unless the state and federal judiciaries receive definitive guidance from this Court, they will remain divided over an important and recurring federal question: Does RFRA prescribe a single or double standard of review for injunctions? To prevent further confusion and disuniformity, the Court should grant certiorari and resolve the conflict over the proper interpretation of RFRA.

Even if there were no conflict, however, the instant case would still merit review on certiorari. The question whether RFRA excludes nuisances is an important issue which is bound to arise again. This Court should settle the matter and thereby provide much needed guidance to the lower courts.

## II. The Decision of the Arkansas Supreme Court Is Erroneous.

The decree of the Arkansas Supreme Court contains several errors, any one of which warrants reversal of the decision below.

### A. The Arkansas Supreme Court Erred in Concluding that RFRA Is Inapplicable Because the Osbornes' Religious Beliefs Do Not *Require* Them to Display Christmas Lights.

RFRA requires strict scrutiny whenever government imposes a substantial burden on a person's exercise of religion. 42 U.S.C. § 2000bb-1. The Arkansas Supreme Court construed the Act as applying only to religious exercises which are *mandatory*

under the tenets of the person's faith. The Court concluded that enjoining the Osbornes' Christmas lights did not burden their free exercise of religion, within the meaning of RFRA, because neither the Roman Catholic nor the Baptist faith requires adherents to display lights. "[T]here is nothing about their religious beliefs which *dictates* that they must celebrate the Christmas season by a massive display of electric lights," the Court observed. "Consequently, to place limitations upon such activity does not constitute an impermissible burden upon the practice of religion." *Osborne I*, 318 Ark. at 863-64, 890 S.W.2d at 572-73 (emphasis added).

The Court's holding is erroneous because RFRA's scope is not limited to mandatory religious exercises. The principal purpose of RFRA was to restore the free exercise doctrine that existed prior to *Employment Division v. Smith*, 494 U.S. 872 (1990). 42 U.S.C. § 2000bb(a)-(b) (Congressional findings and declaration of purposes); S. Rep. No. 103-111, 103d Cong., 1st Sess., 8-9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1898-99. Congress particularly wished to restore the compelling-interest/least-restrictive-means test of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). 42 U.S.C. § 2000bb(b)(1). This Court applied the *Sherbert-Yoder* standard in *Thomas v. Review Board*, 450 U.S. 707 (1981), and rejected a theory much like the one relied on in the instant case by the Arkansas Supreme Court. The Court held in *Thomas* that "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." 450 U.S. at 715-16. Rather, a person is entitled to protection if he or she is motivated by sincerely held beliefs which are "rooted in religion." *Id.* at 713.

Under the analysis applied in *Sherbert*, *Yoder*, and their progeny, nothing hinges on whether a religious practice is mandatory or permissive. To the contrary, this Court has emphasized that judges should not delve too deeply into religious doctrine.

"[I]t is not within the judicial function and judicial competence" to inquire whether a person has correctly construed the tenets of his faith. "Courts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716; *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). Provided religious beliefs are sincere and not so bizarre as to appear clearly nonreligious, a court must accept at face value the asserted impact of government action on the person's free exercise of religion. *United States v. Lee*, 455 U.S. 252, 257 (1982); *Hunt v. Hunt*, 648 A.2d 843, 851 (Vt. 1994) (applying *Lee* to RFRA). As the Massachusetts Supreme Judicial Court noted in *Attorney General v. Desilets*, 636 N.E.2d 233, 237 (Mass. 1994), "Supreme Court free exercise of religion cases have accepted, either implicitly or without searching inquiry, claimants' assertions regarding what they sincerely believe to be the exercise of their religion, *even when the conduct in dispute is not commonly viewed as a religious ritual.*" *Id.* (emphasis added).

The Osbornes testified that their Christmas lights display reflects their sincere religious beliefs. Mitzi Osborne, a Roman Catholic, testified that she celebrates the "birth of our Lord" every year and that the "purpose of those Christmas lights is to spread far and wide the . . . announcement of the birth of our Lord." (Abstract and Brief of Appellants, Vol. I, at 148.) She further testified that the lights symbolize the star which appeared over the manger in which Jesus was born. (*Id.* at 197-98.) Jennings Osborne, a Baptist, testified that the Christmas display was "our way of celebrating the birth of Christ." (*Id.* at 142.)

Since no one questioned the sincerity of the Osbornes' religious beliefs, the Arkansas Supreme Court should have accepted at face value their assertion that the lights were a religious exercise. By insisting that religious conduct be mandatory as well as sincere, the Arkansas Supreme Court added a requirement to those prescribed by Congress in RFRA. The Arkansas Supreme Court's imposition of an additional prerequisite for

RFRA coverage was reversible error.

### B. The Arkansas Supreme Court Erred in Failing to Apply RFRA's Compelling Interest Test; but Even if the Test Had Been Applied, the Court's Injunction Would Not Have Passed Strict Scrutiny Because the Government's Interest in Preventing Traffic Congestion and Minor Trespassing Is Not Sufficiently Compelling to Justify the Injunction's Substantial Burden on the Osbornes' Exercise of Religion.

As argued above, the Osbornes' display of Christmas lights qualifies as the "exercise of religion" protected by RFRA. 42 U.S.C. § 2000bb-2(4) ("the term 'exercise of religion' means the exercise of religion under the First Amendment to the Constitution"). By ordering the Osbornes "to *reduce substantially*" their Christmas lights display, *Osborne II*, 319 Ark. at 52, 890 S.W.2d at 575 (emphasis in original), the Arkansas Supreme Court "substantially burden[ed]" the Osbornes' exercise of religion, thereby triggering RFRA. 42 U.S.C. § 2000bb-1.

The Arkansas Supreme Court should have applied the compelling-interest/least-restrictive-means test prescribed in RFRA. Instead, the Court applied the weaker reasonableness standard of the common law of nuisance. See discussion in section I, *supra*. In effect, the Arkansas Supreme Court revived the doctrine of *Employment Division v. Smith, supra*, evidently reasoning that since the law of nuisance is "neutral and of general applicability [it] need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye. Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2226 (1993) (following *Smith*). Applying the *Smith* approach to the Osbornes' RFRA defense constituted reversible error because Congress explicitly rejected the *Smith* standard. 42

U.S.C. § 2000bb-1.

The Arkansas Supreme Court erred in enjoining religious conduct without making an express finding that the injunction serves a compelling governmental interest. Other courts have considered themselves obliged to make such a finding before rejecting a RFRA argument. *See, e.g, Hunt v. Hunt,* 648 A.2d at 851 (explicitly concluding that "paternal support of children is a compelling state interest"); *Council for Life Coalition v. Reno,* 856 F. Supp. 1422, 1430 (S.D. Cal. 1994) (explicitly finding that Congress "has a compelling interest in prohibiting the use of force and threats of force and physical obstruction of facilities providing reproductive health services"); *Riely v. Reno,* 860 F. Supp. 693, 709 (D. Ariz. 1994) (explicitly finding "a compelling governmental interest in proscribing conduct that harms individuals, damages property and burdens interstate commerce").

Governmental interests span a broad spectrum. At one end are interests that are compelling because they reflect firm national or state policies. Examples of such overriding interests include eradication of racial discrimination in education, *Bob Jones University v. United States,* 461 U.S. 574, 604 (1983); parental support of children, *Hunt v. Hunt,* 648 A.2d at 851; maintenance of order and security in prisons, *Campos v. Coughlin,* 854 F. Supp. at 207; *Lawson v. Dugger,* 844 F. Supp. at 1542; and operation of a national social security system, *United States v. Lee,* 455 U.S. at 258-59. At the other end of the spectrum are interests that are not grounded in paramount national or state policies. Examples of noncompelling interests include preservation of insurance funds, *Thomas v. Review Board,* 450 U.S. at 718-19, *Sherbert v. Verner,* 374 U.S. at 406-07; eradication of age discrimination, *Powell v. Stafford,* 859 F. Supp. 1343, 1347 (D. Colo. 1994); and protection of the cohabitation rights of unmarried couples, *Smith v. Commission of Fair Employment & Housing,* 30 Cal. Rptr. 2d 395, 404-05

(Cal. Ct. App. 3d Dist. 1994); but *see Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274, 280 n. 9 (Alaska) (per curiam), *cert. denied*, 115 S. Ct. 460 (1994) (state has compelling interest in prohibiting marital status discrimination).

The Arkansas Supreme Court identified two governmental interests that are served by its injunction against the Osbornes' Christmas display: enforcement of the subdivision's bill of assurance and protection of Respondents' use and enjoyment of their property through the prevention of display-related traffic congestion and trespassing. *Osborne I*, 318 Ark. at 861-65, 890 S.W.2d at 571-73. Enforcing the bill of assurance hardly rises to the level of a compelling interest. The 1949 bill is a relic from a time when lawyers routinely inserted racially restrictive covenants in deeds. Section 4 provides: "No part of said lands, whether improved or unimproved, shall be leased to, sold to, rented to, owned, used or occupied by any person or persons other than those wholly of the Caucasian race" except for domestic servants. Of course, this covenant is unenforceable under *Shelley v. Kraemer*, 334 U.S. 1 (1948). *Shelley* does not invalidate the anti-nuisance covenant, which prohibits conduct "which may be or become an annoyance or nuisance to adjacent residents or the neighborhood." But the anti-nuisance proviso adds nothing to the protection already afforded by the common law. Given the redundancy of the bill of assurance, it is fair to say that the Arkansas Supreme Court's injunction furthered but a single interest: avoidance of traffic congestion and minor trespassing.

On the spectrum of governmental interests, the interest served by the injunction falls closer to the noncompelling end than to the end reserved for matters of paramount importance. Reaching the contrary conclusion--placing prevention of traffic congestion on a par with prevention of racial discrimination--drains the word compelling of any meaning and seriously debases RFRA's value as a safeguard for religious freedom. Thus, the

Arkansas Supreme Court erred in failing to deny the injunction on the ground that it did not serve a compelling interest.

**C.**

**Even if the Interest in Abating Nuisances Is Compelling, the Arkansas Supreme Court's Injunction Violates RFRA Because It Is Not the Least Restrictive Means Available.**

Assuming, *arguendo*, that avoiding traffic congestion and minor trespassing rises to the level of a compelling interest, the Arkansas Supreme Court's injunction still runs afoul of RFRA. The federal statute provides that any governmental action which substantially burdens the exercise of religion must be "the least restrictive means" of furthering a compelling interest. 42 U.S.C. § 2000bb-l(b)(2). The Arkansas Supreme Court's broad and vaguely worded injunction does not satisfy Congress's exacting standard.

The Arkansas Supreme Court's imprecise order created substantial doubt in the Osbornes' minds concerning the extent to which they had to scale down their Christmas display. The Court enjoined them from "placing massive Christmas light displays on and about their home that are calculated to and do attract an unusually large number of visitors to the neighborhood." They were directed "to reduce substantially the size and extravagance of the display." *Osborne I*, 318 Ark. at 866, 890 S.W.2d at 574. But how big is "massive"? What qualifies as a "substantial" reduction? What sorts of measures are necessary to deter "an unusually large number of visitors"? These and many other pertinent questions were left unanswered in the Court's sweeping decree. The Osbornes had to guess--at their peril--what the Court had in mind. Despite a ninety-five percent (95%) reduction in the number of lights displayed the previous year, Jennings Osborne was ordered to show cause why he should not be jailed for contemptuously disobeying the Court's murky injunction. The injunction and concomitant con-

tempt proceedings will have a profound chilling effect on those who wish to celebrate religious holidays.

Vagueness is not the only defect in the Arkansas Supreme Court's decree. The Court also violated RFRA by shifting the burden of proof from the state to the Osbornes. "In ordering the nuisance abated," the Court held, "*we place the burden on the cross-appellees, the Osbornes,* to reduce substantially the size and extravagance of the display at and about their home to a level which will not attract the large crowds that have been drawn to the neighborhood in the past." *Osborne I,* 318 Ark. at 866, 890 S.W.2d at 574 (emphasis added). Put another way, the Court told the Osbornes that *they* are the ones who must figure out the least restrictive means of abating the alleged nuisance. But RFRA places that burden on the state. The government, not the citizen, must demonstrate that it employed the means least restrictive of religious freedom. 42 U.S.C. §§ 2000bb-l(b) and 2000bb-2(3).

Again, the Vermont Supreme Court's decision in *Hunt v. Hunt,* 648 A.2d 843 (Vt. 1994), is instructive. The Vermont court found that the state had a compelling interest in enforcing child support obligations, but concluded that RFRA invalidated a contempt order because the state failed to meet its burden of establishing that the incarceration of contemners is the least restrictive way to further the state's interest. 648 A.2d at 854. The Arkansas Supreme Court's order suffers from the same defect. The Arkansas Court failed to demonstrate that it could not abate the alleged nuisance with a more precisely tailored injunction.

The trial court injunction issued by Chancellor Ellen Brantley was burdensome but came closer to satisfying the least-restrictive-means test than did the decree of the Arkansas Supreme Court. The Chancellor's order gave the Osbornes some specific guidance as to when and how they could display their Christmas lights. (See App. E and F.) By supplanting

Judge Brantley's relatively detailed decree with a bafflingly general injunction, the Arkansas Supreme Court undercut the protection Congress intended to afford in RFRA.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF ARKANSAS
No. 93-1303
JENNINGS AND MITZI OSBORNE,
*Appellants and Cross-Appellees,*

v.

ARLETA POWER, Dick Wallace, Joe H. Smith, Dennis Lucy, Tom Fiser, and Catherine Cockrill,
*Appellees and Cross-Appellants*

*[Osborne I]*

318 Ark. 858, 890 S.W.2d 570 (1994)

[Filed Dec. 5, 1994]

Appeal from Pulaski Chancery Court,
Fifth Division (93-3148),
Ellen Brantley, Chancellor

318 Ark. at 860

WILLIAM S. ARNOLD, Special Justice. This case is before the court on direct appeal from the chancellor's decree finding that a Christmas lights display at the residence of appellants creates a public and private nuisance and violates an applicable bill of assurance.

Appellees cross-appeal on grounds the chancellor erred in dismissing the complaint of two plaintiffs and in her failure to abate the nuisance by entering an absolute injunction against conducting the display. We modify and affirm on direct appeal and reverse and remand on cross-appeal.

This case comes to this court with significant notoriety attached and upon a very sizable record consisting of four thick volumes of testimony plus a number of photographs, video tapes and other recordings of traffic and debris collection and similar matters in the vicinity of the residences of parties to the action during the Christmas season of 1992. A number of issues have been raised by both the direct appeal and the cross-appeal from the determination by the chancellor that private nuisances and a public nuisance existed, along with a violation of a bill of assurance .

318 Ark. at 861

PART 1

Recusal of Chancellor

Appellants assert that the chancellor should have recused from presiding in this case because of having seen the display. The chancellor followed the procedures required by Canon 3 of the Code of Judicial Conduct by disclosing these facts. She followed the procedures and mandates from prior opinions of this court and determined that it was her duty not to recuse unless her failure would be prejudicial to the litigants. There is a duty not to recuse where no prejudice exists. *U.S. Term Limits, Inc. v. Hill,* 315 Ark. 685, 870 S.W.2d 383 (1994). The decision on whether to disqualify is of particular difficulty where the judicial officer is both the trier of fact and applies the law. *See City of Jacksonville v. Venhaus,* 302 Ark. 204, 788 S.W.2d 478 (1990); *Patterson v. R.T.,* 301 Ark. 400, 784 S.W.2d 777 (1990). The standard of review on appeal is whether the trial judge abused his or her discretion in the matter. *Carton v. Missouri Pac. R. R.,* 315 Ark. 5, 865 S.W.2d 635 (1993). We cannot say the chancellor abused her discretion in determining that she was not disqualified from hearing this case.

*Finding of Nuisance*

The trial court, after exhaustive review of all of the testimony and exhibits and careful consideration of all of the facts, concluded that certain of the plaintiffs had suffered injury greater than that suffered by the public at large and that the effect of appellants' massive and commercial size display was such as to constitute a nuisance under the recognized definitions of nuisance in Arkansas. Appellants, on direct appeal, contend that the findings of fact and conclusion of law are erroneous. On appeal, chancery cases are reviewed *de novo,* but the findings of fact by the chancellor will not be reversed unless they are clearly erroneous, and the burden is upon the appellant to show that the findings are erroneous. *Leathers v. W.S. Compton Co.,* 316 Ark. 10, 870 S.W.2d 710 (1994). The findings of fact by the chancellor were not clearly erroneous, and we find on direct appeal that she did not err in applying the law to those facts.

Among many things considered by the chancellor in reaching that conclusion were evidence (1) of periods of extreme traffic



congestion on public streets in the area of appellants' residence for protracted periods of time; (2) that the backup of traffic and slow movement of traffic presented a risk of physical danger to pedestrians in the area; (3) that the display attracted many pedestrians in the area; (4) the foot traffic in the area was not confined to the public streets but indeed trespassed upon private property of property owners living nearby the site of the display; (5) that motor vehicle accidents had occurred; (6) that pedestrians attempting to cross public streets in the area were endangered by the mass of motor vehicles moving in both directions; (7) that there was a reasonable basis to believe that, if

an emergency occurred in the residential area served by the adjoining streets, emergency vehicles would encounter difficulties in accessing the site where service was required.

Appellants contend that appellees suffered no direct physical damage, and, consequently, it was error to issue the injunction abating the nuisance. The argument is without merit. We have numerous cases in which nuisances have been found to exist that did not cause direct physical damage to the premises of other property owners; instead, the property owners' use and enjoyment of their property was made much more difficult, and the offensive activity was abusive to senses of hearing and smell. Examples are found in *Southeast Ark. Landfill, Inc. v. State,* 313 Ark. 669, 858 S.W.2d 665 (1993) (smells from landfill); *Higgs v. Anderson,* 14 Ark. App. 113, 685 S.W.2d 521 (1985) (noise from dog kennel); *Baker v. Odom,* 258 Ark. 826, 529 S.W.2d 138 (1975) (noise from motorcycle race track).

*Violation of Bill of Assurance*

The chancellor also found that the operation of the massive light display is prohibited by the bill of assurance of the subdivision in which the appellants' home is located. The relevant language from the bill of assurance reads: "Nor shall anything be done thereon which may be or become an annoyance or nuisance to adjacent residents or the neighborhood."

Appellants contend on direct appeal that the chancellor erred in her holding because the language of the bill of assurance is vague and uncertain. The language is not vague or uncertain. A condition which constitutes a nuisance as found by the chancellor also constitutes a violation of the quoted language



in the bill of assurance and the findings to that effect by the

chancellor are not clearly erroneous.

*Dismissal of Parties*

Our examination of the record persuades us the chancellor erred in finding that Catherine Cockrill and Arleta Power did not have sufficient evidence of special damages to establish a private nuisance as distinguished from a public nuisance.

The deprivation of freedom of access to and from their residences which resulted from the traffic snarls and crowding at the intersection of Cantrell and River Ridge Road was a private nuisance not shared by the general public. Accordingly, on direct appeal, we affirm the holding of the chancellor that the operation of the massive light display constitutes a nuisance, but we modify the chancellor's decree to reinstate Catherine Cockrill and Arleta Power as parties plaintiff.

*PART II*

Having concluded, for the reasons stated above, that the operation of the lights display, if continued in substantially the same magnitude as has been the case up to now, is a nuisance, we now take up the cross-appeal and look to means of abatement which are the least restrictive considering the contrasting requisites of protecting rights of free speech and the public interests at stake.

The court is of the opinion that the restraints imposed by the chancellor are insufficient to abate the nuisance in order to protect "the well being, tranquility and privacy of the home [which] is certainly of the highest order in a free and civilized society," *Carey v. Brown,* 447 U.S. 455 471 (1980); *see also Frisby v. Schultz,* 487 U.S. 474 (1987). The Supreme Court has stated that ensuring public safety and order, promoting the free flow of traffic on public streets and sidewalks, protecting citizens' property rights and assuring residential privacy is suf-

ficient to justify an appropriately tailored injunction. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2526 (1994).

As appellants admitted in their testimony there is nothing about their religious beliefs which dictates that they must celebrate the Christmas season by a massive display of electric

318 Ark. at 864

lights. Consequently, to place limitations upon such activity does not constitute an impermissible burden upon the practice of religion. Clearly, any injunctive relief by way of restricting the scope or magnitude of the display is "content-neutral" and, accordingly, is subject to reasonable restraint that burdens no more speech than necessary to protect the rights enumerated above.

In *Western Presbyterian Church v. Board of Zoning Adjustment*, 63 U.S.L.W. 2169 (1994), a recent case involving feeding the homeless pursuant to a church program, the Court held that the zoning ordinance was unconstitutional in its total prohibition and allowed the feeding to be conducted. However, the Court noted that this license was limited to circumstances that did not otherwise become a nuisance, thus recognizing that the Religious Freedom Restoration Act, of itself, would not bar restrictions on activities that are nuisances.

*Abatement*

This court has sought to find a solution that would alleviate sufficiently the problems that now exist arising from the display in its present context and magnitude without totally prohibiting any form of Christmas lighting display at this location. The court has considered a variety of things that might be prohibited or restricted in connection with the display that would minimize its adverse impact upon the residences and the resi-

dential area where it is located. The court is mindful that the courts generally recognize that the peace and quiet of a residential neighborhood and the protection against obnoxious encroachments are important rights in civilization. *Madsen,* 114 S. Ct. at 2526.

For example, the court has considered whether it might limit the power supply sources to the display to those usually and customarily found in residential areas, and it has considered that the display might be operated at random times without prior public notice of any kind as to the times when it would be lighted, and, of course, it has given consideration to the chancellor's ruling limiting the hours of the day and the number of days in which the display could be operated.

The Louisiana Supreme Court was confronted with a similar situation and the result reached there is applicable to the case



here. *See Rodrigue v. Copeland,* 475 So.2d 1071 (La. 1985). In *Rodrigue,* Alvia C. Copeland had erected and operated an annual Christmas display, and a number of his neighbors sought injunctive relief to enjoin the display as a nuisance because the display caused an enormous influx of visitors to their limited access, residential neighborhood. Copeland's Christmas display had grown in size and popularity over a seven-to-eight year period. The Louisiana Supreme Court declared Copeland's display was a nuisance and enjoined Copeland from erecting and operating the Christmas exhibition which was calculated to attract an unusually large number of visitors to the neighborhood. The court added the following instructions, concerning how to abate the display as a nuisance:

> Plaintiffs' injury stems from the nature and size of the display which render it incompatible with a restricted access, residential neighborhood. Defendant is enjoined

> from erecting and operating a Christmas exhibition which is calculated to and does attract an unusually large number of visitors to the neighborhood.
>
> In complying with our order, defendant is specifically enjoined from placing oversized lighted figures, such as the reindeer and snowman, in his yards or upon the roof of his residence. The proper place for these "commercial size" decorations is not within a quiet, residential neighborhood. Defendant is also specifically ordered to reduce the volume of any sound accompanying the display so that it is not audible from within the closest homes of his neighbors.
>
> In limiting his display, the burden is placed on defendant to reduce substantially the size and extravagance of his display to a level at which it will not attract the large crowds that have been drawn to the neighborhood in the past.
>
> Of course, defendant is free to maintain his display unrestricted, at a location which is appropriate. The injunction granted herein is limited to activity at defendant's premises on Folse Drive.

*Id.* at 1079.

318 Ark. at 866

This court has concluded that it is not the appropriate medium to either craft the exact restrictions or to monitor the results. Accordingly, on *de novo* review, we hold that the current restrictions are insufficient to abate the nuisance and, much as was done by the Louisiana court in *Rodrigue*, we enjoin cross-appellees, the Osbornes, from placing massive Christmas light displays on and about their home that are calculated to and do attract an unusually large number of visitors to the neighbor-

hood. Further, cross-appellees are ordered to reduce the volume of any sound accompanying the display so that it is not audible from within the closest homes of neighbors.

In ordering the nuisance abated, we place the burden on the cross-appellees, the Osbornes, to reduce substantially the size and extravagance of the display at and about their home to a level which will not attract the large crowds that have been drawn to the neighborhood in the past. Of course, this injunction only applies to the cross-appellees' residence, and they are free to maintain a massive display in an unrestricted manner at a location where it is appropriate. *See Baker v. Odom,* 258 Ark. 826, 579 S.W.2d 138 (1975).

We remand the case to the chancery court for enforcement of the injunction and such further proceedings as might be necessary.

Modified and affirmed on direct appeal.

Reversed and remanded on cross-appeal.

SPECIAL JUSTICE ERNIE E. WRIGHT joins.

NEWBERN and BROWN, JJ., not participating.

APPENDIX B

SUPREME COURT OF ARKANSAS

No. 93-1303

JENNINGS AND MITZI OSBORNE,
*Appellants and Cross-Appellees,*

v.

ARLETA POWER, Dick Wallace, Joe H. Smith, Dennis Lucy, Tom Fiser, and Catherine Cockrill,
*Appellees and Cross-Appellants*

*[Osborne II]*

319 Ark. 52, 890 S.W.2d 574 (1994)

[Filed Dec. 16, 1994]

Motion for Stay of Mandate denied.

319 Ark. at 52

PER CURIAM. The Osbornes seek a motion for stay of mandate, stating their intentions to file a petition for a writ of certiorari to review this court's final decree. On December 5, 1994, this court , on de novo review, enjoined the Osbornes from placing a massive Christmas light display on and about their home. Following a comparable situation and case in Louisiana, we specifically directed the Osbornes to *reduce substantially* (1) the size and extravagance of the display at and about their home so the display will not attract large crowds to the

residential neighborhood and (2) the volume of any sound accompanying the display so it is not audible from within the closest homes of neighbors.

The Osbornes' motion for stay alleges they intend to reassert their defense, rejected here, that the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (RFRA), prevents enjoinment of their Christmas lights as a common-law nuisance. They propose to raise the following three points under the RFRA:

319 Ark. at 53

> (1) whether the RFRA allows a state court to substitute a common-law reasonableness nuisance standard for the compelling interest/least restrictive test prescribed by the RFRA;
>
> (2) whether the interest in preventing traffic congestion is sufficiently compelling to justify enjoining the religious exercise of displaying Christmas lights; and
>
> (3) whether this court's extremely broad and vaguely-worded injunction satisfies the least-restrictive means test of the RFRA.

As discussed in our December 5 opinion, we view this case as one involving a public and private nuisance, not religious beliefs, and the RFRA is simply not controlling. Nor do we find merit in the Osbornes' suggestion that the court's injunction is extremely broad and vaguely worded. This court's directives as reiterated above are clear and unambiguous and are the same as those applied in *Rodrigue v. Copeland,* 475 So.2d 1071 (La. 1985), where the parties evidenced no subsequent concerns as to what was meant by the Louisiana Supreme Court. In sum, massive commercial lighting displays generated by

commercial transformers are not appropriate in quiet residential neighborhoods and violate express provisions of bills of assurances. We envision little merit in the foregoing points as a basis for an entitlement to certiorari.

For the foregoing reasons, we deny the Osbornes' motion for stay. We repeat that this court reviewed the cause de novo and enjoined the nuisance. While we believe the immediate injunction is short, concise and readily understandable, the parties may present any good faith inquiries to the chancellor to whom this case has been remanded for enforcement.

APPENDIX C

SUPREME COURT OF ARKANSAS

No. 93-1303

JENNINGS AND MITZI OSBORNE,
*Appellants and Cross-Appellees,*

v.

ARLETA POWER, Dick Wallace, Joe H. Smith, Dennis Lucy, Tom Fiser, and Catherine Cockrill,
*Appellees and Cross-Appellants*

*[Osborne III]*

319 Ark. 177, 890 S.W.2d 575 (1994)

[Filed Dec. 20, 1994]

Motion for Imposition of Contempt Sanctions; Order to Show Cause issued.

319 Ark. at 178

PER CURIAM. On December 5, 1994, this court on *de novo* review, issued an injunction enjoining the Osbornes from placing a massive Christmas light display on and about their home. The trial court and this court determined the Osborne display was a private and public nuisance. This court directed the Osbornes to reduce substantially the size and extravagance of the display so it will not attract the large crowds that had been drawn to the neighborhood in the past. On December 13, 1994, the Osbornes sought a motion for stay of mandate, an-

nouncing their intentions to petition for a writ of certiorari with the Supreme Court. On December 15, 1994, the appellees, by response, opposed the Osborne motion, suggesting to this court an ominous course of conduct by the Osbornes and their representatives, indicating plans to willfully disobey the court's directives. We denied the Osborne motion for reasons set out by per curiam dated December 16, 1994. In denying that motion, this court retained jurisdiction of this cause. Among other things, this court's December 16, 1994 opinion stated the following:

> On December 5, 1994, this court, on *de novo* review, enjoined the Osbornes from placing a massive Christmas light display on and about their home .... we specifically directed the Osbornes to *reduce substantially* (1) the size and extravagance of the display at and about their home so the display will not attract large crowds to the residential neighborhood . . . Nor do we find merit in the Osbornes' suggestion that the court's injunction is extremely broad and vaguely worded. This court's directives as reiterated above are clear and unambiguous . . . In sum, massive commercial lighting displays generated by commercial transformers are not appropriate in quiet residential neighborhoods and violate express provisions of the bills of assurances...
>
> 319 Ark. at 179
>
> we believe the immediate injunction is short, concise and readily understandable . . .

On December 19, 1994, appellees filed a motion for imposition of contempt sanctions, alleging that Jennings Osborne has deliberately disobeyed this court's injunction. Appellees set forth the following:

> 1. Scarcely twenty-four hours after this court's order dated December 16, 1994, the Osbornes' lawyer advised

the media by fax message that the Osbornes would light their display. At approximately 7:30 p.m. on Saturday, December 17, 1994, the Osbornes applied electric power to a vast portion of the massive display they have continued to build on the property they own on Cantrell Road. The display remained in operation until after 11:00 p.m., attracting hordes of sightseers even though there had been no advance notice to the public concerning the lighting of the display.

2. Beginning shortly after nightfall on Sunday, December 18, 1994, hundreds of cars and a large number of pedestrian sightseers began to assemble in the neighborhood near the Osborne property. At approximately 7:30 p.m., Jennings Osborne once again lighted massive displays located on his property on Cantrell Road. Although no advance notice was given to the public, more traffic congestion and large crowds of pedestrians resulted; with traffic backed up on Cantrell Road to Pavilion in the Park on the east and I-430 on the west.

3. Attached as exhibits to this Motion are affidavits of Lieutenant Jerry Smith, Arleta Power, and Tom Fiser, along with photographs and a videotape which verify the factual allegations set forth above.

4. The blatant and willful conduct of Jennings Osborne in deliberate disobedience of the injunction requires appropriate sanctions. Sanctions must be imposed to punish the premeditated defiance of the court's orders and to compel future compliance with those orders.

5. The court is requested to issue an immediate order directing the personal appearance of Jennings Osborne, for



the sole purpose of determining that he did in fact light the massive displays on and about his property.

Considering appellees motion and allegations therein, appellant Jennings Osborne is hereby ordered to appear before this court at 9:00 a.m on December 27, 1994, to show cause why he should not be held in contempt of court for willfully disobeying this court's orders.

APPENDIX D

SUPREME COURT OF ARKANSAS

No. 93-1303

JENNINGS AND MITZI OSBORNE,
*Appellants and Cross-Appellees,*

v.

ARLETA POWER, Dick Wallace, Joe H. Smith, Dennis Lucy, Tom Fiser, and Catherine Cockrill,
*Appellees and Cross-Appellants*

*[Osborne IV]*

319 Ark. 239, 890 S.W.2d 577 (1995)

[Filed Jan. 9, 1995]

Appointment of a Special Master

319 Ark. at 239

PER CURIAM. On December 20, 1994, this court issued a per curiam order directing appellant Jennings Osborne to appear at 9:00 a.m. on December 27, 1994 to show cause why he should not be held in contempt for willfully disobeying this courts' orders. On December 21, 1994, Mr. Osborne filed a motion questioning

319 Ark. at 240

this court's jurisdiction to conduct a contempt hearing and alternatively seeking appointment by this court of a master to take evidence. Mr. Osborne also filed his petition for rehear-

ing on December 21, raising ten points upon which he claims his rehearing petition should be granted. On December 22, 1994, appellees opposed the appointment of a master, and additionally requested that Osborne not be allowed to relitigate prior issues that already have or could have been litigated.

On December 27, 1994, the parties, represented by respective counsel, appeared at the show cause hearing as directed. On the same date, Mr. Osborne filed (1) a response denying he has ever willfully disobeyed any court order, (2) a motion to dismiss, alleging this court's orders of December 5 and 16, 1994 are vague and ambiguous and are non-final orders, (3) a motion for a disinterested prosecutor and a request for a jury trial and (4) a notice of withdrawal of Robert "Bob" Lowry as one of Mr. Osborne's counsel .

Upon consideration of the parties' motions, affidavits, responses and arguments of counsel, we appoint the Honorable George Cracraft as a master to conduct an evidentiary hearing necessary for this court to decide whether Mr. Osborne, by the lighting of his Christmas display on December 17th, 18th and 19th of 1994, willfully disobeyed this court's prior December 5 and 12, 1994 orders. The master is empowered to proceed discretionally under ARCP 53 and consistent with this per curiam. The master is also directed to require both appellants and appellees to file a bond, to be approved by the clerk, to secure payment of costs adjudged against them incurred in taking and transcribing the proof including the fee of the master.

The master's evidentiary hearing is limited to determining (1) whether Mr. Osborne reduced substantially the size and extravagance of the display at or about the Osborne home to a level which would not attract the large crowds that had been drawn to the neighborhood in the past, (2) whether Mr. Osborne continued massive Christmas light displays on and about his home that are calculated to and do attract an unusually large number of visitors to the neighborhood and (3) whether Mr.

Osborne reduced the volume of any sound accompanying the display so that it is not audible from within the closest homes of neighbors. Considering the foregoing factual issues, the master

319 Ark. at 241

is given power to allow parties to produce evidence bearing on those terms set out in this court's December 5th and 16th orders in light of the specific allegations contained in the appellees' motion seeking contempt and Mr. Osborne's response, including, but not limited to, the comparative differences in the size, construction, and electrical energy used in the displays of 1993 and 1994, as well as the comparative foot and vehicular traffic involved.

Regarding Mr. Osborne's motions and petition for rehearing filed on December 21 and 27, 1994, appellees are given ten days from the date of this per curiam within which to respond. After that ten-day period, the court will take those legal issues under submission for decision. If any decision or ruling the court renders, concerning those motions, petition and responses, affects this per curiam, appointment of a master or the procedure set forth herein, the court will address any required changes upon making those rulings. If no changes are required by the court's rulings, the master shall proceed in the manner set forth herein above, and schedule a hearing so he may file a report of his findings no later than 45 days after the date this court decides the pending motions and petition and legal issues contained therein.

Special Justices WILLIAM S. ARNOLD and ERNIE WRIGHT join.

NEWBERN and BROWN, JJ., not participating.

APPENDIX E

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

No. 93-3148

ARLETA POWER, Dick Wallace, Joe H. Smith,
Dennis Lucy, Tom Fiser, and Catherine Cockrill,
*Plaintiffs,*

v.

JENNINGS and MITZI OSBORNE,
*Defendants*

[Filed Dec. 9, 1993]

ORDER

In accordance with the Court's oral Findings of Fact and Conclusions of Law reached at the conclusion of the trial of this case, the Court finds that the operation of the Osborne Christmas Light Display, as planned for the 1993 Christmas Season, and future Christmas seasons, will constitute both a public and private nuisance. In order to abate the nuisance, the Court hereby enjoins the Defendants from presenting their Christmas display except under the following conditions:

1. The electronic gates at #4 Robinwood will be closed when the display is illuminated except for the entry of invited guests.

2. The Osbornes are to implement the "Osborne Family Plan" (introduced into evidence as Defendants' Exhibit 25, attached hereto and incorporated herein as if set forth

word-for-word).

3. The security guards referred to in the "Osborne Family Plan" are to be stationed as follows when the display is illuminated:

a. Two guards are to be stationed on Misty Lane at #2 Robinwood;

b. Two guards are to be stationed on Millbrook at #6 Robinwood;

c. One guard is to be stationed at the intersection of Robinwood and Highway 10; and

d. One guard is to be stationed at the intersection of Gibson Road and Highway 10.

4. The display will be illuminated on the following dates and times:

a. Tuesday, December 14, 1993, beginning at 7:30 p.m.;

b. Wednesday, December 15, 1993, beginning at 7:30 p.m.;

c. Thursday, December 16, 1993, beginning at 7:30 p.m.;

d. Saturday, December 18, 1993, beginning at 7:30 p.m.;

e. Monday, December 20, 1993, beginning at 7:30 p.m.;

f. Tuesday, December 21, 1993, beginning at 7:30 p.m.;

g. Friday, December 24, 1993, from 5:00 p.m. until 8:00 p.m.;

h. Saturday, December 25, 1993, beginning at 7:30 p.m.;

i. Monday, December 27, 1993, beginning at 7:30 p.m.;

j. Tuesday, December 28, 1993, beginning at 7:30 p.m.;

k. Thursday, December 30, 1993, beginning at 7:30 p.m.;

l. Saturday, January 1, 1994, beginning at 7:30 p.m.;

m. Sunday, January 2, 1994, beginning at 7:30 p.m.;

n. Monday, January 3, 1994, beginning at 7:30 p.m.; and

o. Thursday, January 6, 1994, beginning at 7:30 p.m.

The Court finds that the relief granted in this Order will not substantially burden the free exercise of religion or unreasonably restrict the consitutional right to freedom of expression.

IT IS SO ORDERED this 9th day of December, 1993.

/s/ ELLEN BRANTLEY, Chancellor

Defendants' Exhibit 25, incorporated by reference in paragraph 2 of Chancellor Brantley's Order of December 9, 1993

OSBORNE FAMILY PLAN

LITTERING:

The Osborne family is going to place six (6) litter cans at various places around the areas in order to make litter disposal convenient to visitors. The locations of the cans are as follows:

1. one at the corner of Millbrook and Cantrell;
2. one at the corner of Gibson and Cantrell;
3. one at the corner of Robinwood Drive and Cantrell;
4. one at the corner of Misty Lane and Cantrell;
5. one near the back of the Elwood property on Misty Lane;
6. one near the back of the Brazil property on Millbrook.

The cans will be put out each evening 30 minutes prior to the lighting of the display and brought in when the display has been turned off. The cans will be attractively decorated with a sign attached to each that reads as follows:

DON'T LITTER
RESPECT OUR NEIGHBORS' PROPERTY
THE OSBORNE FAMILY

TRESPASSING:

1) The Osbornes will put out candy cane stakes at the front, side and back of the Elwood and Brazil properties and any other close neighbor who requests them. Attached to the chains between the poles will be signs that read:

THE OSBORNE FAMILY REQUESTS
THAT YOU NOT WALK OR PARK
INSIDE THESE CHAINS
ENJOY THE LIGHTS
AND RESPECT OUR NEIGHBORS' PROPERTY

2) The Osbornes will have two to four (2-4) security guards patrol the perimeter of the property on which the display is located and the two adjacent properties to help discourage trespassing.

PUBLICITY :

The Osborne Family will prepare and distribute to appropriate outlets a public service announcement and request that it be run/broadcast as often as possible. The public service announcement will:

1) identify appropriate routing of traffic; and
2) encourage use of trash receptacles;
3) and encourage use of designated pedestrian pathways.

APPENDIX F

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

No. 93-3148

ARLETA POWER, Dick Wallace, Jo : H. Smith,
Dennis Lucy, Tom Fiser, and Catherine Cockrill,
*Plaintiffs,*

v.

JENNINGS and MITZI OSBORNE,
*Defendants*

[Filed Jan. 10, 1994]

ORDER AND SUPPLEMENTAL FINDINGS

Plaintiffs filed a Motion for Reconsideration, pursuant to Rule 52(b) on December 10, 1993. The Defendants have responded to the Motion and Plaintiffs have replied. In addition, both parties have requested supplemental findings with respect to certain contested issues. Based on the pleadings filed, the statements and arguments of counsel, and the evidence presented, the Court makes the following Order and Supplemental Findings.

1. The Motion for Reconsideration, with respect to requests to modify provisions of this Court's Order of December 9, 1993, is denied. The Court does contemplate, however, that an adequate remedy for 1994, or future years, will require restrictions at least as severe as those imposed for the 1993 display.

2. The Court finds that the Osborne Christmas Light Dis-

play is both a public and private nuisance as to Plaintiffs Lucy and Fiser. Based on the nuisance findings regarding the Robinwood Plaintiffs, the operation of the Osborne Light Display also violates the restrictions in the Robinwood Bill of Assurances introduced in evidence.

Plaintiffs Lucy and Fiser have standing to enforce those restrictions. The restrictive covenants which prohibit the operation of a nuisance provide an alternate basis for restricting the operation of the Osborne Light Display. The Court finds that the pertinent restrictions in the Bill of Assurances are essentially identical to the restrictions imposed by the common law of nuisance.

3. The nuisance and bill of assurance claims of Plaintiffs Power, Wallace, Smith, and Cockrill are dismissed. Based on the principles contained in *Wellbourn v. Davies*, 40 Ark. 83 (1882), the Court finds that Plaintiffs Power, Cockrill, Wallace, and Smith do not have standing to bring a public nuisance claim under the evidence presented. The basis for this finding is that, while the injuries suffered by these plaintiffs may be greater in degree than those suffered by the general public, they do not appear to be different in kind from those experienced by the general public.

4. With respect to the free exercise of religion claim, raised by the Defendants, the Court finds that the evidence established that the construction and maintenance of a Christmas light display was not required by the religious beliefs held by the Defendants. The remedy provided in the Court's Order of December 9 does not offend the Free Exercise clause of the First Amendment, because it does not substantially burden the free exercise of religion under the evidence presented at the trial. The Religious Freedom Restoration Act does not change this result, because the Order of December 9 does not substantially burden the free exercise of religion, since the construction and maintenance of a Christmas light display is not a required tenet

of the Defendants' religious beliefs or practice.

5. With respect to the free speech issues raised by the defense, the Court finds that the operation of the light display is a form of expression, but also finds that the expressive conduct is subject to reasonable restrictions as to time, place, and manner. The restrictions contained in the Order of December 9 are completely content-neutral, and are reasonable time, place, and manner limitations which are justified by the finding that the operation of the display creates a public and private nuisance.

6. The Court finds that the evidence did not establish a diminution in value with respect to property in the neighborhood as a whole. The evidence did establish that property in the immediate vicinity of the display probably suffered some decrease in value because of the operation of the display. In the Court's mind, the loss in value was not quantifiable and this issue was not an overwhelming factor in the decision.

7. The Defendants' Motions to Dismiss the Bill of Assurance allegations from the Complaint; to Dismiss on Statute of Limitations grounds; and sufficiency of the evidence with respect to Plaintiffs Fiser and Lucy, which was made at the conclusion of the evidence, are all denied.

IT IS SO ORDERED, this 10th day of January, 1994.

/s/ ELLEN B. BRANTLEY, Chancellor

APPENDIX G

SUPREME COURT OF ARKANSAS

No. 93-1303

JENNINGS AND MITZI OSBORNE,
*Appellants and Cross-Appellees,*

v.

ARLETA POWER, Dick Wallace, Joe H. Smith,
Dennis Lucy, Tom Fiser, and Catherine Cockrill,
*Appellees and Cross-Appellants*

[Filed Jan. 23, 1995]

ORDER DENYING PETITION FOR REHEARING

Petition for rehearing is denied. Appellants' motion for clarification is denied. Special Justices William S. Arnold and Ernie E. Wright join. Newbern, Brown, and Roaf, JJ., not participating.

## APPENDIX H

Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141,107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (Supp. V 1994)):

### § 2000bb. Congressional findings and declaration of purposes

#### (a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

#### (b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose reli-

gious exercise is substantially burdened by government.

**§ 2000bb-1. Free exercise of religion protected**

**(a) In general**

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

**(b) Exception**

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

**(c) Judicial relief**

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

**§ 2000bb-2. Definitions**

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

**§ 2000bb-3. Applicability**

**(a) In general**

This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

**(b) Rule of construction**

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

**(c) Religious belief unaffected**

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

**§ 2000bb-4. Establishment clause unaffected**

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion ( referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

APPENDIX I

SUPREME COURT OF ARKANSAS

No. 93-1303

JENNINGS AND MITZI OSBORNE,
*Appellants and Cross-Appellees,*

v.

ARLETA POWER, Dick Wallace, Joe H. Smith, Dennis Lucy, Tom Fiser, and Catherine Cockrill,
*Appellees and Cross-Appellants*

[Filed Jan. 30, 1995]

ORDER DENYING JURY TRIAL AND DISINTERESTED PROSECUTOR

Appellants' specific request for trial by jury is denied.

Appellants' motion for a disinterested prosecutor and to disqualify appellees' counsel from serving as a prosecutor is denied.

Motion of Arkansas Democrat-Gazette to quash subpoena. Moot.

Special Justices William S. Arnold and Ernie E. Wright join.

Newbern, Brown, and Roaf, JJ., not participating.

APPENDIX J

SUPREME COURT OF ARKANSAS

No. 93-1303

JENNINGS AND MITZI OSBORNE,
*Appellants and Cross-Appellees,*

v.

ARLETA POWER, Dick Wallace, Joe H. Smith, Dennis Lucy, Tom Fiser, And Cathrine Cockrill.
*Appellees and Cross-Appellants*

[Filed Feb. 20, 1995]

ORDER DECLARING CRIMINAL NATURE OF CONTEMPT PROCEEDINGS AND DENYING DISCOVERY

Contempt proceedings are to be considered criminal in nature with a possible range of punishment as set forth in Ark. Code Annotated Section 16-10-108. See *Carle v. Burnett*, 311 Ark. 477, 845 S.W.2d 7 (1993).

Motion for discovery is denied.

Request for ruling on pending motion denied.

Special Justices William S. Arnold and Ernie E. Wright join.

Newbern, Brown, and Roaf, JJ., not participating.

APPENDIX K

IN THE
SUPREME COURT OF ARKANSAS

No. 93-1303

JENNINGS AND MITZI OSBORNE,
*Appellants/Defendants,*

v.

ARLETA POWER, Dick Wallace, Joe H. Smith, Dennis Lucy, Tom Fiser, and Catherine Cockrill,
*Appellees/Movants*

[Filed Apr. 4, 1995]

REPORT OF THE MASTER

Pursuant to the January 9, 1994 per curiam order of the Arkansas Supreme Court, the master has concluded the evidentiary hearing on the three questions referred by the Court in its order. The hearing was commenced at 9:30 a.m. on March 13, 1995, and concluded at 4:30 p.m. on March 14, 1995. Sixteen witnesses testified in person and a similar number of exhibits were exhibited and received in evidence. In resolving apparent conflicts in the testimony, the master considered the manner and demeanor of the witnesses while on the stand, their opportunity to observe the matters about which they testified, and any basis for bias either for or against Jennings Osborne and his Christmas light display. Due to the nature of these proceedings, all doubts were resolved in favor of the accused. The resolution of conflicts as to the comparative sizes of the

displays, crowds drawn to them, and flow of traffic along Cantrell Road was aided considerably by reference to video cassettes of the events marked Movants' Exhibits 1 and 2 and Defendant's Exhibits 2, 4 and 12.

It was not disputed that Jennings Osborne and his wife own and erected light displays in 1993 and 1994 on three lots of approximately equal size which front on Cantrell Road. They were referred to as the "east lot," the "main" or "residential lot," and the "west lot." In 1993, Christmas displays were illuminated on all three lots. In 1994, displays were illuminated on the three lots from 7:30 p.m. to 10:00 p.m. on December 17, 18, and 19. On the main or residential lot, only one figure of an angel was illuminated on the latter dates.

For the convenience of the Court, a brief synopsis of the testimony on which the master's findings are based is attached as an addendum hereto.

## FINDINGS OF FACT

REFERRED QUESTION ONE: Did Jennings Osborne reduce substantially the size and extravagance of the display at or about his home to a level which would not attract the large crowds that had been drawn to the neighborhood in the past?

The master finds that Osborne did substantially reduce the size and extravagance of the display.

It was not contradicted that the 1993 display on the east lot contained 268,080 lights or that the 1994 display contained only 84,280 lights. This represents a reduction of approximately 69%. Nor was it disputed that the 1993 display on the west lot contained 265,480 lights, as compared to 89,760 in 1994. This represents a reduction of approximately 67%.

On the main residential lot the 1993 display contained 2,642,240 illuminated lights. In 1994, only 560 lights were il-

luminated. (Defendant's Exhibit 7) There was evidence that approximately 1,300,000 to 1,750,000 lights were in place on this lot but were not illuminated in 1994. The overall reduction on all three lots was approximately 95%.

There was expert testimony that the intensity of the display was reduced in 1994 and that the electrical energy consumed per hour by the 1994 display was reduced to less than 8% of that consumed in 1993. (Defendant's Exhibit 13) The master finds that these reductions were substantial.

REFERRED QUESTION TWO: Was the 1994 Osborne display calculated to and did it attract unusual numbers of visitors to the neighborhood?

The master answers both aspects of this question in the negative.

The testimony on whether the number of visitors to the neighborhood was reduced in 1994 was in conflict. The evidence, however, supports the finding that both vehicular and pedestrian traffic was substantially reduced in 1994. The video cassettes introduced and exhibited at the hearing clearly indicate that reduction. It is concluded that the 1994 display did not attract an unusually large number of visitors.

Whether it is calculated to do so is more difficult to determine. Osborne's intention can only be determined from those permissible inferences which can be drawn from the evidence adduced. William Lowery, Osborne's attorney, testified that he advised Osborne as to the steps to be taken to bring the 1994 display into compliance with the December 5th order. His advice in at least five areas appears to have been designed to reduce the number of visitors. 1) The size and density of the display was reduced by 95%. 2) The public and media were given no advance notice of when the display would be illuminated. 3) Visitors were not permitted to enter the residence

compound as they had in the past. 4) Osborne and his wife did not make any appearance during the display. 5) The display was illuminated for only three nights rather than seven nights as in previous years. When any doubts are resolved in Osborne's favor, it would be a reasonable inference that his conduct was calculated to reduce the number of visitors to be drawn to the neighborhood.

REFERRED QUESTION THREE: Did Osborne reduce the volume of any sound accompanying the display so that it would not be audible from within the closest homes of the neighbors?

The only evidence presented indicated that little or no sound was generated by the exhibit which would be audible more than a few feet from the display. There was no evidence that sound was audible in neighboring homes in 1994.

At the evidentiary hearing, the issue of willful intent to violate the order was injected as a defense to the allegation of contempt. Although that issue was not referred to the master, the evidence was received in the belief that it would be relevant to the question of punishment in the event the Court should find Osborne's actions to be contemptuous of its order.

It is hardly open to question that the decision to illuminate the display was made by Osborne. In that sense, the action was "willful and "intentional." There was, however, no evidence to contradict the testimony of Robert Lowery, a member of the bar, that all of the actions taken by Osborne were on advice of his counsel. This Court has held that, although acting on advice of counsel is not a complete defense to contempt, it is a strong mitigating factor. *Folsom v. State,* 216 Ark. 31, 224 S.W.2d 44 (1949); *Baker v. State,* 177 Ark. 13, 5 S.W.2d 337 (1928); *Poindexter v. State,* 109 Ark. 179, 159 S.W. 197 (1913).

Lowery testified that he had been Osborne's legal advisor for 15 years. He had difficulty interpreting the wording of the order of the Court but researched it thoroughly. He stated that

he went over the 1994 display with Osborne "item by item," recommending which parts should not be illuminated so as to meet the Court's direction to reduce substantially both the size and extravagance of the display and the number of visitors to the neighborhood. Lowery testified that he advised Osborne that the display illuminated in December 1994 would not be violative of this Court's order. There was no evidence to the contrary. Osborne did not testify.

The testimony presented at the hearing justifies a finding that all of the actions of Osborne, if contemptuous, were taken on advice of his regular counsel.

On March 10, 1995, a motion to dismiss the contempt proceedings was filed and brought to the attention of the master. The motion contended that, upon issuance of a mandate on January 26, 1995, the Supreme Court lost all jurisdiction over this case and therefore the master had no power to proceed. Such a motion is properly addressed to the Court en banc. However, in order not to further delay the hearing, the master temporarily denied the motion on the grounds that any contempt alleged had been exhibited while the Supreme Court had plenary jurisdiction and that its power to conduct these ancillary proceedings with respect to it was not abated by the mandate. The motion is hereby referred to the full Court for its ruling thereon.

Respectfully submitted this 3 day of April, 1995.

/s/ George K. Cracraft, Master

## ADDENDUM

## SYNOPSIS OF TESTIMONY

TOM FISER is one of the plaintiffs in the case who lives in the neighborhood. He observed that the displays on Osborne's property were not complete on December 5, 1994, but the erection of the displays continued thereafter. He testified that he observed the displays in 1993 and 1994. He found no reduction in either size or intensity in 1994. On the three relevant nights in 1994, all of the lights were turned on on the east and west lots, but only one figure of an angel was illuminated on the main or residential lot. He observed traffic back up for several blocks in both directions on each of the three nights. Movants' Exhibit 1 and Defendant's Exhibit 1 are video cassettes showing the display and the traffic flow on December 18, 1994. Defendant's Exhibit 2 is a video cassette of the 1992 display taken from the air. It was very similar to the 1993 display. There were over 2,500,000 lights in the 1993 display and all were red. He described the 1994 traffic as "abnormally large" and "congested." He did not recall any sound flowing from the display.

SGT. TOM BERNARD of the Little Rock Police Department testified that he headed a squad of six officers that handled special traffic problems. On December 17, 1994 he dispatched his squad to the Osborne neighborhood. In addition, there were six other police officers and five motorcycle officers present. At least eight off duty officers, employed by Osborne, were also directing traffic. Traffic was backed up for 3/4 mile to the east and 1/2 mile to I-430 to the west. Sergeant Bernard had been at the scene in prior years. He noted "considerable" reduction in the size of the 1994 Osborne Christmas display. He could not attribute any of the traffic problem in December 1994 to crowds at shopping centers or to the Christmas display at the First Church of the Nazarene on Mississippi Avenue.

[MOVANTS REST. Defendant's motion to dismiss for insufficient evidence denied and reserved for the full court.]

SHERRY JOYCE is a legal assistant for the Perroni Law Firm, attorney for Osborne. She stated that the office received numerous calls from the media inquiring about the times and dates the Osbornes would illuminate their Christmas display. On December 17, she released a press release stating that they did not know when the lights would be turned on, but the Osbornes and their attorney were relying on the appeal process and that the order of December 5, 1994 would be complied with. She denied any report that she or anyone in her office had released information that the lights would be turned on at any specific time.

ROBERT LOWERY testified that he was a duly licensed member of the Arkansas bar and that he had represented Osborne for over 15 years. After the December 5 decision of this Court was announced, Lowery concluded, and so advised Osborne, that the order was not final or binding until the petition for rehearing had been decided and a mandate issued under the terms of Rule 5 of the Supreme Court. He stated that at that time he was hopeful that this Court would reverse itself or that Justice Clarence Thomas of the United States Supreme Court would issue a stay. For these reasons, he advised that the erection of the display might continue after the date of the order.

He further testified that, as the order did not prohibit any display, he advised Osborne that a display reduced in size and extravagance would not be violative of the order. To that end, he went over the displays with Osborne "item by item," recommending that some lights already in place not be illuminated and other parts of the displays be reduced in size. He advised Osborne that the display illuminated on December 17, 18, and 19, 1994 would not be considered violative of the order.

RICHARD McCORMACK testified that he was a full-time

employee of Osborne and was in charge of preparing the displays in both 1993 and 1994. In 1993, 265,480 lights were included in the display on the west lot, as compared to 89,760 lights in 1994. This represents a reduction of approximately 69%).

In 1993, 268,080 lights were installed on the east lot as compared to 84,280 in 1994. That represents a reduction of approximately 67%). Although there were over 1,500,000 lights in place on the residential lot in 1994, only 560 of them were illuminated.

The "west wall" of lights in 1994 contained angels and other symbols and was 53 feet high by the length of the lot. The "wall" of lights on the east lot was 55 feet high.

[Defendant's Exhibits 6, 7, and 8 contain a detailed listing of the lights and comparison as to percentages for the two years. Defendant's Exhibits 10 and 11 are photographs of some of the displays in place in 1994 but not illuminated. Defendant's Exhibit 12 is a video tape of the 1994 displays and traffic flow.]

McCormack testified that in 1993 there was a much larger number of vehicular and pedestrian visitors than in 1994. He also testified that the intensity of the lights was reduced in 1994.

Steve Menhart, a professor of electronics at the University of Arkansas at Little Rock, found from his experiments that in 1993 over 1600 KWH per hour of use in electrical energy was expended in the displays. In 1994, the consumption of energy was reduced to 124 KWH per hour. This was less than 7.7% of the energy required in prior years.

[Defendant's Exhibits 13 and 14 contain detailed results and graphs of the professor's testing and comparison of the displays in the two years.]

REV. WAYNE McCORMICK, pastor of the Church of the Nazarene located at the corner of Mississippi and Evergreen Road, testified about the "living nativity" shown at his church each Christmas. On December 17, 1994, 3600 persons in cars and on foot came to the pageant. On the following night, there were 4600. He usually requests people to attend the Osborne display first and turn right from Cantrell onto Mississippi en route to his church. On December 17, he observed the Osborne display and encountered no difficulty in traffic. The display was not lighted "to the degree" it has been in 1993. He observed some people going from Osborne's along Cantrell Road to the "living nativity." He did not observe a back-up of traffic on Cantrell Road.

JAMES EMERSON resides near Osborne on Millbrook Road. He went to see the Osborne display on two occasions in 1993 accompanied by friends, relatives, and out of town visitors. In 1993, there was a constant flow of both pedestrian and vehicular traffic in the vicinity of the display. At that time, traffic moved quite slowly.

Emerson observed the display on two of the three nights that it was illuminated in December 1994. He saw few if any pedestrians at the scene. He drove by the Osborne display in both directions and encountered no difficulty with traffic. He expressed a liking for the display and supports the continued maintenance of it.

MRS. PATTY LUEKEN, MRS. PHYLIS MILNE, AND MRS. ETHEL COOK are residents of the neighborhood. All three observed the Osborne display in 1994 and in prior years. They testified that there was a traffic problem in 1993 but none in 1994. In the later year, the traffic flowed freely in both directions. They had no advance notice of when the display would be turned on. They agreed that pedestrian traffic in 1994 was minute. All three approved of the display.

JASON BARRETT is a part-time investigator for the Perroni Law Firm. Barrett identified Defendant's Exhibit 14 as a video tape taken by him of the traffic passing the Osborne exhibit in 1993 during a period of one hour and three minutes. A segment of this video was shown to the master. Barrett testified that at an earlier date he had played the cassette slowly and counted at least 1000 pedestrians passing the display during the one hour and three minute period. In that same interval, he counted 808 vehicles pass in the eastbound lane and 847 in the westbound lane.

MICHAEL VOWERS, also an investigator for the Perroni firm, testified that in 1993 he drove by the display on several occasions. The traffic was heavy and slow and there were many pedestrians at the scene. In 1994 he drove past the display on several occasions without difficulty and observed very few pedestrians. There were no crowds.

DR. MARYLIN PARENS is a professor of English at UALR, qualified as an expert in the use of the English language. She stated that most, if not all, recognized dictionaries did not consider the words "massive," "extravagant," "substantial," and "unusual" to be words having a single or definite meaning. Although most of these words can become more definite and certain when considered in context, the word "substantial" does not. The professor was impressive and appeared quite learned in her field. Her testimony was obviously intended to bolster that of Mr. Lowery that the language of the order was confusing.

[DEFENSE RESTS. The defense then renewed its motion questioning the sufficiency of the evidence. It was again overruled and reserved for ruling by the full Court.]